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Supreme Court of the United States

October Term

No. 71-1613

DAVID THOMAS McBRIDE,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The respondent, the Commonwealth of Virginia, respectfully submits the following brief in opposition to the granting of a writ of certiorari in the above matter. The parties will be referred to herein by their respective positions in the trial court, i.e., defendant and Commonwealth.

QUESTIONS PRESENTED

The Commonwealth would restate the questions presented as set forth in defendant's brief, as follows, in order to remove from the issues statements of arguable facts:

1. Were the arrest and search warrants which resulted in defendant's conviction issued upon an adequate showing of probable cause?

2. Is Virginia's Unitary Trial system unconstitutional?

3. Did the trial judge abuse or deny the defendant's constitutional right to due process by refusing to disclose and/or answer questions propounded by the jury?

STATEMENT OF THE CASE

Defendant's statement of the case is substantially correct and is hereby adopted. The Commonwealth would take issue with defendant's statement that objection was made to the procedure of the trial court in not disclosing to the parties the content of questions asked by the jury. The Appendix to defendant's brief sets out the portions of the transcript relating to this matter, and show that no objection was actually made. It should also be pointed out that this incident occurred prior to closing arguments of both parties and prior to the giving of the court's instructions.

ARGUMENT

1. Were The Arrest And Search Warrants Which Resulted In Defendant's Conviction Issued Upon An Adequate Showing Of Probable Cause?

The warrants in question were issued by an impartial magistrate at the request of a police officer, State Trooper, B. F. Chumney, pursuant to his work as an undercover officer investigating drug violations. In support of his application for the issuance of the warrants he presented the magistrate a sworn affidavit setting forth certain facts. The crucial question before the Court is whether those facts

were sufficient to establish probable cause for the issuance of the warrants, therefore those facts should be examined. (Said affidavit is fully set out in the Appendix to defendant's brief.)

The affidavit showed that Officer Chumney had arranged to purchase LSD through an individual named Clingenpeel. After meeting Clingenpeel and driving to a certain location, Clingenpeel advised Chumney that he was going to purchase the LSD from one David McBride. Clingenpeel subsequently returned with some LSD, sold it to Chumney and told him that it had been obtained from McBride. Substantially the same procedure was used two days later for another purchase. After Clingenpeel returned the second time, he and his companion, Lola Applegate, were arrested, and he then told Chumney again that he had purchased the LSD from McBride and described more fully the transaction.

On both occasions the informant, Clingenpeel, told the undercover officer, not knowing he was a policeman, that he was going to purchase the drugs from McBride, and on both occasions he told the officer he had in fact obtained the drugs from McBride. The information the informant gave after arrest, and after being confronted with the fact that Chumney was a police officer, did not materially add to the information the officer already had, except as to the location and description of McBride's house. The informant was clearly named in the affidavit, so this is not the case of an unnamed informant.

As pointed out by the defendant in his brief, the leading cases in this area are *Aguilar* v. *Texas*, 378 U.S. 108, 12 L.Ed.2d 723, 84 S.Ct. 1509 (1964); *Spinelli* v. *United States*, 393 U.S. 410, 21 L.Ed.2d 637, 89 S.Ct. 584 (1969); and *United States* v. *Harris*, 403 U.S. 573, 29 L.Ed.2d 723,

91 S.Ct. 2075 (1971). *Aguilar* established the so-called "two pronged" test to determine whether the affidavit for issuance of the warrant is sufficient. First the affidavit must set forth the underlying circumstances to allow the magistrate to determine probable cause for believing that the drugs are where the informer says they are. Secondly, the affidavit must set forth the underlying circumstances or otherwise give facts sufficient for the magistrate to determine the credibility of the informant or the reliability of his information.

There is no question in this case, and it is so admitted by the defendant in his brief, that the affidavit in question meets the first test, that is it sets forth sufficient facts for supplying probable cause for believing that the drugs were in McBride's house, so long as the informant's statements are credible. The only question left, and the one addressed by defendant's brief, is whether the informer Clingenpeel could be found sufficiently credible or whether reliability can properly be attributed to his information.

Initially, this is obviously not a situation where the information came from an unnamed informer for whom no reasons were given to support his reliability other than the affiant's personal belief. Therefore this is not the situation presented in either *Aguilar* or *Spinelli* and neither of those cases is directly controlling. In the instant case, the affidavit went much farther, and was based upon the informer's own observations of and participation in the criminal conduct. As the Court pointed out in *Spinelli,* it is important to know whether the informer came by his information directly or indirectly.

> "The tip does not contain a sufficient statement of the underlying circumstances from which the informer concluded that Spinelli was running a bookmaking

operation. We are not told how the FBI's source received his information—it is not alleged that the informant personally observed Spinelli at work or that he had ever placed a bet with him. Moreover, if the informant came by the information indirectly, he did not explain why his sources were reliable. . . . In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activities in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." 393 U.S. 410, 416.

The information in the instant case met all of these objections set out in *Spinelli;* the informer was named and identified, he participated in the actual purchase of drugs from the defendant, and therefore was not basing his tip on rumor, reputation or hearsay, but on personal, first hand observation and experience. His reliability was established because he told the officer who he was going to buy the drugs from even before he bought them, as well as afterwards, and he described in detail the place where the sale took place and the circumstances surrounding the transaction. All of this information was included in the affidavit, and it is submitted by the Commonwealth that this was more than substantial information from which to justify the reliability of the informer and his information. The detail provided in the instant case is more in keeping with that accepted in *Draper* v. *United States,* 358 U.S. 307, 3 L.Ed. 2d 327, 79 S.Ct. 329 (1959), and which the Court pointed out in *Spinelli* was a "suitable benchmark."

Furthermore, in the instant case you have the additional factor approved and accepted in *Harris, supra,* that the

informer was making these statements against his own interests. And contrary to the assertion of the defendant, the inclusion in *Harris* of the factor of admission against interest was not a casual afterthought of the Court, nor merely an alternate ground for approval of the affidavit. The reasoning of the Court for accepting such statements is quite sound:

> "Common sense in the important daily affairs of life would induce a prudent and disinterested observer to credit these statements. People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility—sufficient at least to support a finding of probable cause to search. That the informant may be paid or promised a 'break' does not eliminate the residual risk and opprobrium of having admitted criminal conduct. . ."

In the instant case, the defendant attempts to confer all sorts of devious and tricky motives on the informant in order to avoid the effect of *Harris*. He says that the informer's statements were made solely to provide him with "an out"; that he was trying to take the heat off by placing the blame on someone else; and that he was suspicious that Chumney might be a police officer and was therefore covering up. None of these bold assertions by the defendant have even the remotest basis in fact.

When the informer first told Chumney that he was buying from McBride, he didn't know Chumney was a police officer. He could not possibly have been trying to pass the blame to someone else. He was still guilty of illegal distribution of drugs whether he bought them from McBride or anyone else. Further, there is no evidence now, and certainly was none in the affidavit, or before the magistrate, that the in-

former continued to give information after his arrest in exchange for any promise of leniency or anything else. *Harris* disposes of that argument anyway, even if there was such evidence.

The defendant thinks nothing of making all sorts of inferences which the magistrate supposedly could have made to doubt the credibility of the informer, without any supporting evidence; yet will not allow the magistrate to make reasonable and probable conclusions from the full information that is before him. The Commonwealth submits that the affidavit in the instant case did overcome the objections of *Aguilar* and *Spinelli*, and met the conditions as well of *Draper*, *Harris* and *Jones* v. *United States*, 362 U.S. 275, 4 L.Ed.2d 697, 80 S.Ct. 725 (1960).

2. Is Virginia's Unitary Trial System Unconstitutional?

This unitary system, whereby the jury trying a case, after the defendant has elected to be tried by a jury, decides whether the accused is guilty and also determines the punishment, has been repeatedly upheld against this sort of attack by the Virginia Supreme Court. *Johnson* v. *Commonwealth*, 208 Va. 481, 158 S.E.2d 725 (1968); *Bloodgood* v. *Commonwealth*, 212 Va. 255, 183 S.E.2d 734 (1971); *Brown* v. *Commonwealth*, 212 Va. 515, 184 S.E.2d 786 (1971).

More importantly, such a unitary verdict system has also been upheld recently by this Court. *McGautha* v. *California*, *Crampton* v. *Ohio*, 402 U.S. 183, 28 L.Ed.2d 711, 91 S.Ct. 1454 (1971). See also *Spencer* v. *Texas*, 385 U.S. 554, 17 L.Ed.2d 606, 87 S.Ct. 648 (1967).

The defendant cites no reasons why these decisions should now be overturned. This is not the type of dilemma encountered in *United States* v. *Jackson*, 390 U.S. 570, 20

L.Ed.2d 138, 88 S.Ct. 1209 (1968), because in the instant case the maximum possible punishment was the same in either case, jury trial or judge trial. In addition, the issue never was presented to the trial court, since a pre-sentence report was not requested.

3. Did The Trial Judge Abuse Or Deny The Defendant's Constitutional Right To Due Process By Refusing To Disclose And/Or Answer Questions Propounded By The Jury?

The defendant's trial lasted two days. After reconvening for the second day the trial judge and the parties considered instructions while the jury remained recessed. When the jury was called back in for the closing arguments and the giving of instructions, the trial judge was given a piece of paper containing some written questions which the jury wanted to be answered. This was prior to the jury retiring to deliberate, but after all the evidence had been given and the witnesses excused. (The questions propounded and the record of the proceeding relating thereto are set out in the Appendix to defendant's brief.)

The trial judge, after reading the questions, then advised the parties that he had received the questions, and because of the nature of them was not going to attempt to answer them. Further, he stated that he would not disclose the contents to the parties because it would show what phases of the case were bothering the jury. This was obviously meant as a reference to the fact that counsel had yet to make their closing arguments to the jury.

It should be pointed out at the outset that no proper objection was made to this procedure by the defendant. Rule 5:7 (formerly Rule 1:8) of the Rules of the Supreme Court of Virginia, reads as follows:

> "This Court will not notice any objection requiring a ruling of the trial court unless the ground of objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice. . . ."

This rule has been interpreted to require that the trial judge be informed of the precise points of objection in the minds of counsel so that he may rule intelligently, thereby avoiding delay and the expense incident to appeals, reversals and new trials upon grounds of objection which might have been obviated or corrected in the trial court. *Reil* v. *Commonwealth,* 210 Va. 369, 171 S.E.2d 162 (1969); *Williamson* v. *Commonwealth,* 211 Va. 57, 175 S.E.2d 285 (1970). An objection to a ruling of the trial court must be made and an exception taken at the time the occasion arises, otherwise the objection is waived. *Witt* v. *Mernicks,* 210 Va. 70, 168 S.E.2d 517 (1969); *Russo* v. *Commonwealth,* 207 Va. 251, 148 S.E.2d 820 (1966); *Callards* v. *Commonwealth,* 208 Va. 340, 157 S.E.2d 198 (1967). This rule has even been applied to the failure of a defendant to object to the admission of evidence on the grounds of invalidity of a search warrant. *Manley* v. *Commonwealth,* 211 Va. 146, 176 S.E.2d 309 (1970).

Therefore this issue was never properly presented to the trial court and never properly before the Virginia Supreme Court, and could not have been considered by the Virginia Supreme Court, even though defendant attempted to raise it in his petition for writ of error, and even though the summary denial of said petition by the Virginia Supreme Court did not state any grounds for such denial. It should also be noted that this was cited as a defense in the Commonwealth's brief in opposition to defendant's petition for writ of error. See also *People* v. *Nelson,* 29 Mich. App. 251, 185 N.W.2d 183.

Under *Parker* v. *North Carolina,* 397 U.S. 790, 25 L.Ed.2d 785, 90 S.Ct. 1458 (1970) this Court cannot review a matter which was not reviewable by the state supreme court because it was not properly raised at the time of trial.

Without conceding the points raised above, the Commonwealth contends that this issue lacks any merit on which to reverse defendant's conviction. No cases have been found which raise this exact issue, however it has been consistently held that the question of whether a jury may be given information on what a witness had testified to is a matter resting in the discretion of the trial court. *United States* v. *DePalma,* 414 F.2d 394 (9th Cir., 1969); *Gregory* v. *United States,* 365 F.2d 203 (8th Cir., 1966); *Pinckney* v. *United States,* 352 F.2d 69 (5th Cir., 1965); *Tyler* v. *United States,* 361 F.2d 862 (10th Cir., 1966); *United States* v. *Jackson,* 257 F.2d 41 (10th Cir., 1958); *United States* v. *Carminati,* 247 F.2d 640 (2nd Cir., 1957); *Henry* v. *United States,* 204 F.2d 817 (6th Cir., 1953); *United States* v. *Rosenberg,* 195 F.2d 583 (2nd Cir., 1952), cert. den. 344 U.S. 838, 97 L.Ed. 652, 73 S.Ct. 20, reh. den. 344 U.S. 889, 97 L.Ed. 687, 73 S.Ct. 134, reh. den. 347 U.S. 1021, 98 L.Ed. 1142, 74 S.Ct. 860; *State* v. *Vaughn,* 200 Ore. 275, 265 P.2d 249 (1954); *State* v. *Richter,* 21 N.J. 421, 122 A.2d 502, cert. den. 351 U.S. 975, 100 L.Ed. 1492, 76 S.Ct. 1039.

Clearly, the trial judge in the instant case did not abuse his discretion in not revealing the questions to the parties prior to their closing arguments. To do so would have allowed counsel to know what matters were considered important by the jurors and to zero in on those points in their closing argument. This could have easily rendered an unfair advantage to one side or the other. And the defendant

never made any further request to have the questions revealed and/or answered after the closing arguments were completed and before the jury retired to deliberate.

Defendant asserts that he had a right to have the questions answered, citing *Jackson* v. *Commonwealth,* 19 Gratt (60 Va.) 656 (1870). A close reading of that case shows that no such holding is contained therein, nor did the court consider that question, but merely stated as a matter of fact that the trial court had answered questions of the jury. Although there are numerous cases holding both ways (see Annotation in 50 A.L.R.2d 176), there have been any number of cases upholding a trial court's decision not to answer such questions propounded by the jury. *United States* v. *Rosenberg, supra; United States* v. *DePalma, supra; Henry* v. *United States,* 204 F.2d 817 (6th Cir., 1953); *People* v. *Nelson, supra; State* v. *Richter, supra; State* v. *Close,* 106 N.J.L. 321, 148 A. 764 (1930); *Small* v. *Wegner,* 267 S.W.2d 26 (Mo., 1954), *Compton* v. *State,* 179 Ga. 560, 176 S.E. 764 (1934).

Defendant has not shown how he was prejudiced or harmed in any way by the action of the trial court, nor has he shown how this was a denial of due process, except for his self-serving statement that it was. A close look at the questions will show that to answer them would in fact have highlighted certain evidence which helped to prove that defendant was guilty. Therefore to answer the questions would have done more harm than good to the defendant.

CONCLUSION

For the reasons set out herein, it is submitted that no error was committed by the trial court or the Virginia Supreme Court, and the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on or before the 6th of October, 1972, I mailed three copies of this brief to F. Guthrie Gordon, III, Lowe & Gordon, 1111 West Main Street, Charlottesville, Virginia 22903 and John C. Lowe, Lowe & Gordon, 1111 West Main Street, Charlottesville, Virginia 22903, counsel for petitioner.

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